CASE NO.: LC 29/2005

SUMMARY

RONALD PATRICK KURTZ

versus

NAMPOST NAMIBIA LTD

MTAMBANENGWE, AJ

28 DECEMBER 2005

Application on Notice of Motion - Urgency of - Fifteen days unexplained delay in launching application sufficient reason not to condone non compliance with requirements of the Rules of Court applicable to Notice of Motion Proceedings - INTERIM INTERDICT - Requirements of - points *in limine* - two points *in limine* taken by respondent and upheld sufficient basis to dismiss application without necessity to consider other requirements. Costs - special order of costs or any order of costs denied in circumstances revealed on the papers.

CASE NO.: LC 29/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RONALD PATRICK KURTZ

APPLICANT

and

NAMPOST NAMIBIA LIMITED

RESPONDENT

CORAM: MTAMBANENGWE, A J.

Heard on: 2005.12.15

Delivered on: 2005.12.27

RULING:

MTAMBANENGWE, A J.: In this matter I am only concerned with points in limine advanced by both parties to the application.

Applicant seeks in this Application, on an urgent basis, the following relief:

1. Condonation of non compliance with Rules of Court applicable to applications on Notice of Motion and that the matter be heard as one of urgency.

"2. That (the) rule nisi be issued pending the application before a declaration order which the Applicant intends to bring, calling upon the Respondent to show cause why:

2.1 The Respondent should not be interdicted and restrained from proceeding with the disciplinary hearing of Applicant on 15

December 2005 at 14h00 until finalization of the application for the Declaratory Order referred to in paragraph 2 above;

2.2 the decision of Respondent to deny the Applicant external legal representation is not to be part of and parcel of the application for the declaratory order;

2.3 the Respondent should not be ordered to postpone the Disciplinary Hearing of the Applicant set for 15 December 2005 at 14h00 in order to afford the Applicant adequate opportunity and time to prepare and present his defence with the assistance of a legal practitioner of his choice.

3. Ordering the relief sought in terms of paragraph 2.1, 2.2 and 2.3 of the rule nisi to operate as

interim orders with immediate effect pending the return day of the rule.

4. Granting the Applicant such further or alternative relief as the Honourable Court may deem fit."

As is clear from the paragraph three interim relief is sought to take effect on the day the application was launched i.e. 15 December 2004. This was not to be because, Respondent having been served, at short notice, Counsel appeared on its behalf to oppose the granting of the application.

The matter was accordingly postponed to 23rd December to enable Respondent to file it's Answering Affidavit and the Applicant a replying Affidavit.

In its Answering Affidavit Respondent raised two points in limine, while in his replying Affidavit the Applicant raised one point in limine.

The Applicant's point in limine challenged the capacity of Respondent's deponent "to depose to the Answering Affidavit" because, Respondent being an incorporated company no

resolution was annexed to the Answering Affidavit to show that he was authorised as, he said, to do so.

I dismissed this point in limine on 23 December 2003 because on 22 December Respondent had filed the resolution by its board of directors. In oral argument Mr Hinda who appeared for the Applicant argued that the resolution was not properly brought before the Court; in the replying Affidavit it was said if the resolution existed there was no explanation why it was not annexed. Mr Obbes who appeared for the Respondent explained the time constrains that led to the resolution being filed later than the Answering Affidavit, that the application, served at short notice, was launched during a period

when most people would be going on holiday.

When the matter was postponed on 15 December the Court ordered that Respondent file its answering Affidavit on Monday the 19th of December and Applicant file his replying Affidavit on 21st December 2005. The Answering Affidavit was sworn to on the 19th December; the resolution was passed on 22 December. In the circumstances the court did not feel that the Answering Affidavit should be ignored; to do so would be tantamount to allowing the Court to be slave to the rules, or, on mere technical grounds, to refusing Respondent to

be heard when the Applicant was, in the first place, responsible for the time constraints affecting the filing of the papers.

The first point in limine raised by Respondent was that Applicant had not made a case of urgency as required in terms of Rule 6(2)(b) of the Rules of Court. This was so because Applicant "was already finally appraised on 1 December 2005 that external representation would not be permitted at the scheduled disciplinary hearings. Applicant had nonetheless waited for two weeks to bring the application on 15 December 2005 and has not explained the delay. The application was served on Respondent at 12:25 on 15th December and the application was set down for 14h00 the same day. The Respondent thus alleges that Applicant under these circumstances was trying to snatch procedural advantage over the Respondent and so attempted to

undermine Respondent's right to be heard.

The sequence of events in this matter in so far as this issue is concerned, was that on 30th November 2005 Applicant attended a disciplinary hearing accompanied by a legal practitioner of the law firm Ueitele Legal Practitioners and Conveyances who had been his legal practitioners of record in the matter of the dispute between the parties running back many months and culmmating in him being charged with misconduct on 10 November 2005. Applicant's legal

practitioner was not allowed to represent him on 1 December 2005 Applicant had applied in writing to the chairperson of the disciplinary hearing when, be it noted, the hearing commenced. In his founding Affidavit Applicant omits to say that his application for permission to be represented by an external legal representative was refused on that date, 1 December 2005. He says that the proceedings of 30th November 2005 and 1 December 2005 were postponed pending the typing of the minutes thereof. On 12 December he was informed that the adjourned proceedings would continue on 14, 15 and 16 December 2005.

It is common cause that Applicant's cause of action is the refusal on 1 December 2005 of his application to be represented by an external legal practitioner. Applicant, however, brings in a number of other issues adventitious to this cause of action. For example he

complaints that he had been suspended since 1 March 2005 and the charges against him were only brought some two hundred and seventy days after he was suspended, and that on 12 December when he was informed that the disciplinary hearing would continue on 14, 15 and 16 December he was served with bulky documents which relate to the charges.

It is correct, as Mr Obbes stated in oral argument on 23rd December, that no explanation is given of the delay from 1st December to 12th

December 2005 when applicant would have expected the proceedings to continue any time, albeit subject to his being notified as was indeed done on 12 December 2005. The fact remains that his cause of action having accrued on 1 December 2005, it did not depend on any of these other adventitious issues for him to launch his application for external legal representation.

Mr Hinda was at pains in oral argument to try and explain the delay in terms of events which in essence had nothing to do with the delay of two weeks. It is not argued that even if the continued disciplinary hearing were postponed sine die and were to stand so postponed his intended application for a declaration would wait till he was informed as to when the disciplinary hearing would continue.

In other words the urgency of the matter does not arise from the fact that he was suddenly confronted with bulky documents on 12 December 2005, unless that was his cause of action. In his founding Affidavit Applicant under a heading – urgency of the relief sought - says:

> "I attended the disciplinary hearing on 14th December 2005 and the following transpired, I was informed that the hearing will continue on 15th December 2005 at

> 14h00 thus leaving me with no option but to approach this Court on an urgent basis."

This means that even the notification on 12 December 2005 that "the disciplinary hearing will proceed on 14, 15 and 16 December 2005 did not galvanize him into action but the notification on 14 December 2005. In that statement Applicant clearly misconceives his stated cause of action, or appears to contradict the same. I agree that no case of urgency is made out in applicants founding Affidavit.

The requirements of an interim interdict are now well known to most if not to all legal practitioners. I single out two of them as most glaringly unsatisfied in this application.

An Applicant for an interim interdict is required to satisfy the court that he has no satisfactory alternative remedy if the interdict is not granted. In paragraph 6.11.4 of his founding Affidavit the following is stated:

> "6.11 I respectfully submit that:
>
> 6.11.1 I have established a prima facie right

6.11.2 That I have a well grounded apprehension of irreparable harm of

the interim relief is not granted and if the hearing proceeds without any legally represented.

6.11.3 That the balance of convening favours the granting interim relief.

6.11.4 That I have no alternative satisfactory remedy in the circumstances if the disciplinary hearing were to proceed.

In this paragraph Applicant in fact sets out the requirements for the grant of an interim interdict.

The second point in limine taken by Respondent relates to paragraph 6.11.4 when it says:

> “27 Applicant wholly fails to explicitly set forth the reasons why he could not be afforded substantial redress at a hearing in due course.”

Indeed it appears by hearing, Applicant is talking of the pending hearing in the disciplinary proceedings. It is trite that hearing in due course embraces a much wider concept. As Manyarara AJ said at page 21 in Habenicht v Chairman of the Board of Namwater Limited and Others NLLP 2004(4) 18 NHC:

> "The second requirement of Rule 6(12)(b) is that an Applicant must state the reasons why he claims he could not be afforded substantial redress at a hearing in due course."

The disciplinary hearing in progress do not preclude the following remedies or redress open to Applicant:

(a) the internal appeal procedures which are available to him in terms of respondents Human Resource Policy during which he could raise the refusal to allow him external legal representation

(b) recourse to the District Labour Court with a complaint of unfair dismissal one of the possible grounds of complaint would be possibly the denial of external legal representative

(c) an appeal to the Labour Court should the district labour court fail to sustain his complaint, or review proceedings in terms of Section 18 of the Labour Act, Act no. 6 of 1992 in particular 18(i)(e) which gives the Labour Court exclusive jurisdiction "to issue any declaratory order in relation to the application or interpretation of any provision of this Act ..... or any term or condition of ..... or any contract of employment."

The Answering Affidavit says Applicant's allegation as his prima facie right is misguided because the disciplinary process is far from complete and it is premature for him to allege that the hearing will, in due course, be unfair. Counsel for Respondent adverted to this, saying that the allegation, simply

on the basis that he is not allowed to be represented by an external legal practitioner, is speculative and premature. He says while Applicant is entitled to a fair hearing, the fairness of a disciplinary hearing must be assessed in totality. He says it is to Respondent's prejudice to unwarrantedly delay the commencement and finalization of the proceedings while Applicant remains on full remuneration on suspension. He goes on to quote the following passages from Le Roux: The South African Law of Unfair Dismissal:

> "25. Procedural fairness is often seen as a 'right' accruing to employees only. This, it is submitted, is not the whole truth. Employers have a real interest in providing and applying fair, but realistic, procedures. Fair procedures will assist in ensuring that justice is done, not only to the employee concerned, but also to co-
>
> employees, members of management, as well as the employer concerned. They also have a right to ensure that these procedures are not

unduly cumbersome, time consuming and expensive.

32. It is sometimes difficult to predict whether the court will regard a particular procedure as fair or not, or whether the employer was entitled to dismiss an employee without following any procedure at all. To some extent this uncertainly is unavoidable. Whether a procedure is fair will depend on the circumstances of each case."

And further

"It is not easy to provide a definitive description

of what constitutes a fair procedure. Some decisions have taken the approach of setting out a checklist of specific elements of a fair procedure, others have spelt out the requirement in fairly general terms. Nevertheless, the more generally accepted

> elements of a fair hearing can be identified ... ... It is important to emphasize at the outset that, depending on the circumstances of the case, a dismissal may be regarded as being procedurally fair even if one or more of these elements are not present. The essential question remains whether, in a specific circumstances of the cases, the procedure was substantially fair.
>
> See Le Roux at 153 – 155.

On these points in limine taken by Respondent, I agree that the application stands to be dismissed, and there is no need to consider other points Counsel or the Respondent's Answering Affidavit raised.

As regards costs, the circumstances that, rightly or wrongly, led Applicant to launch the application are not such as lead to the conclusion that the application was launched simply for the unwarranted purpose of delaying the commencement and finalization of the disciplinary hearing. The question of proper legal representation is important to the Applicant, judging from

his submissions when he made the application to that end. The circumstances certainly do not warrant an order of costs to be made against the Applicant, let alone a punitive order of costs as prayed for by the Respondent.

In the result the application is dismissed and I make no order as to the costs of this application.

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MTAMBANENGWE, A J.

ON BEHALF OF APPLICANT MR S UEITELE

Instructed by: Ueitele Legal Practitioners

ON BEHALF OF RESPONDENT MR D OBBES

Instructed by: Lorentz and Bone Legal Practitioners